



General Assembly

Distr.: General
9 August 2012

Original: English

Sixty-seventh session

Item 70 (a) of the provisional agenda*

**Promotion and protection of human rights: implementation
of human rights instruments**

Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Note by the Secretary-General

The Secretary-General has the honour to transmit the interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, submitted in accordance with General Assembly resolution 66/150.

* A/67/150.



Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Summary

In the present report, submitted pursuant to General Assembly resolution 66/150, the Special Rapporteur addresses issues of special concern and recent developments in the context of his mandate.

The Special Rapporteur draws the attention of the General Assembly to chapters III to V of the present report, concerning the death penalty and the prohibition of torture and cruel, inhuman and degrading treatment. In chapter IV, the Special Rapporteur recalls that actual practices of the death penalty must comply with the absolute prohibition of torture and cruel, inhuman and degrading treatment and explores whether States can guarantee that the method of execution or the conditions of persons sentenced to death do not inflict illegitimately severe pain and suffering. In chapter V, the Special Rapporteur takes new developments and State practice into account and explores if there is an evolving standard to consider the death penalty as running afoul of the prohibition of torture and cruel, inhuman and degrading treatment or punishment. Conclusions and recommendations are provided in Chapter VI.

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I. Introduction

1. The present report, submitted pursuant to paragraph 40 of General Assembly resolution 66/150, is the fourteenth submitted to the General Assembly by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.
2. The Special Rapporteur wishes to draw attention to the reports submitted to the Human Rights Council (A/HRC/19/61 and Add.1-5).

II. Activities related to the mandate

3. Below is a summary of the activities carried out pursuant to the mandate since the submission of the above-mentioned reports.

A. Country visits

4. The Special Rapporteur has been invited to visit Morocco from 15 to 22 September 2012.¹ He has also been invited to conduct a follow-up visit to Uruguay in December.
5. With regard to his visit to Bahrain, which was postponed by the Government, the Special Rapporteur has proposed dates in February 2013 and awaits a reply. He has proposed new dates to the Government of Iraq for a visit in the first quarter of 2013. At the invitation of the respective Governments, the Special Rapporteur plans to visit Guatemala and Thailand in 2013.
6. The Special Rapporteur visited Tajikistan from 10 to 18 May 2012. He shared his preliminary findings with the Government and issued a press statement on 18 May. The mission report to Tajikistan will be presented to the Human Rights Council at its twenty-second session in March 2013.

B. Highlights of presentations and consultations

7. On 17 and 18 January 2012, the Special Rapporteur participated in a consultation held in Addis Ababa on the enhancement of cooperation between the African and the United Nations special procedures mechanisms for the promotion and protection of human rights.
8. On 16 February, the Special Rapporteur delivered a statement at the global conference on Forensic evidence in the fight against torture, held in Washington, D.C.
9. On 1 March, the Special Rapporteur discussed the misuse of prolonged solitary confinement under the Supermax Confinement Program at an event held in New York.
10. From 5 to 8 March, the Special Rapporteur was in Geneva for the nineteenth session of the Human Rights Council. He met with representatives from the Permanent Missions of Bahrain, Cuba, Iraq, Kyrgyzstan, Morocco, Tajikistan, Thailand, Tunisia, the United States of America and Uruguay.

¹ The Special Rapporteur also intends to visit Laayoune, Western Sahara.

11. On 22 March, the Special Rapporteur participated in a meeting concerning the Global Campaign to Stop Torture in Health Care.
12. On 4 April, the Special Rapporteur met with high-level officials from the United States Department of State in Washington, D.C.
13. On 12 April, the Special Rapporteur delivered a statement to a public hearing convened by the Subcommittee on Human Rights of the European Parliament in Brussels on the theme "Secret rendition and detention practices: how to protect human rights while countering terrorism?"
14. On 14 and 16 April, the Special Rapporteur delivered a speech on torture in international law to the University of Chicago and the University of Notre Dame, respectively.
15. On 9 May, the Special Rapporteur delivered a keynote speech on trafficking and torture at a meeting of the Human Dimension Committee of the Organization for Security and Cooperation in Europe, held in Vienna.
16. On 20 and 21 May, the Special Rapporteur participated in a round-table meeting on torture prevention in Kyrgyzstan. The meeting, held in Bishkek, concerned the implementation of recommendations contained in his report on his mission to Kyrgyzstan.
17. On 8 June, the Special Rapporteur participated in an informal expert discussion on the protection of human rights of persons deprived of their liberty, held in Geneva.
18. On 9 and 10 June, the Special Rapporteur participated in a regional workshop on the prevention of torture in the context of democratic transitions in North Africa, held in Rabat.
19. From 11 to 15 June, the Special Rapporteur participated in the nineteenth annual meeting of Special Rapporteurs, held in Geneva. On 13 June, he participated in an expert meeting concerning torture by non-State actors.
20. On 22 June and 2 August, the Special Rapporteur participated in meetings, organized by the Embassy of Switzerland in Washington, D.C., to discuss issues related to the mandate.
21. On 25 and 26 June, the Special Rapporteur participated in meetings of an expert panel on the death penalty, convened by Harvard Law School, United States of America.
22. On 17 July, the Special Rapporteur gave a presentation concerning the mandate at the University of Oxford, United Kingdom of Great Britain and Northern Ireland.
23. On 18 July, the Special Rapporteur visited the forensic and legal services of the human rights organization, Freedom from Torture, in London.
24. On 6 and 7 August, the Special Rapporteur participated in a workshop on technologies and human rights monitoring, convened at Stanford University, United States of America.

66. A growing concern at the irreconcilable conflict between the legally imposed death penalty and the infliction of torture or cruel, inhuman or degrading treatment or punishment is evident even where some organs of protection have hesitated to pronounce accordingly. In the case *Ng v. Canada* (1993) of the Human Rights Committee, dissenting opinions show resounding disapproval of the majority's attempt to make a distinction among various methods of execution, because the death penalty as such constitutes cruel, inhuman and degrading treatment, regardless of how it is carried out.⁵⁰

67. In his partly dissenting opinion to the decision in the case *Ocalan v. Turkey* (2005),⁵¹ Judge Lech Garlicki stated that article 3 had been violated because any imposition of the death penalty represented per se inhuman and degrading treatment prohibited by the Convention. Thus, while correct, the majority's conclusion that the imposition of the death penalty following an unfair trial represented a violation of article 3 of the European Convention seemed to him to stop short of addressing the real problem. He drew attention to the 2002 opinion of the Parliamentary Assembly of the Council of Europe in which it recalled that, in its most recent resolutions, it had reaffirmed its beliefs that the application of the death penalty constituted inhuman and degrading punishment and a violation of the most fundamental right, that to life itself, and that capital punishment had no place in civilized, democratic societies governed by the rule of law. Judge Garlicki stated that, in consequence, the only question that remained was whether the Court had the power to state the obvious truth, namely, that capital punishment had become an inhuman and degrading punishment per se.

68. Five years later, the European Court held in the case *Al-Saadoon and Mufdhi v. United Kingdom* (2010)⁵² that judicial execution involved the deliberate and premeditated destruction of a human being by the State authorities and that, whatever the method of execution, the extinction of life involved some physical pain. In addition, the Court held: that the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering; the fact that the imposition and use of the death penalty negated fundamental human rights had been recognized; and that in the preamble to Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Contracting States had described themselves as convinced that the abolition of the death penalty was essential for the full recognition of the inherent dignity of all human beings. It therefore could be stated that the European Court, by referring not only to the destruction of a human being but to the physical pain and moreover the intense psychological suffering that the foreknowledge of death gives rise to, acknowledged that the death penalty constituted also a violation of the prohibition of torture and cruel, inhuman and degrading treatment. In addition, on 26 June 2007, the Parliamentary Assembly of the Council of Europe adopted resolution 1560 on the promotion by member States of an international moratorium on the death penalty, in

⁵⁰ Human Rights Committee, communication No. 469/1991. See also Manfred Nowak, "Is the death penalty an inhuman punishment?", in *The Jurisprudence of Human Rights Law: A comparative and interpretive approach*, Theodore S. Orlin, Allan Rosas and Martin Scheinin eds. (Turku, Finland: Institute for Human Rights, Abo Akademi University, 2000).

⁵¹ Judgement of 12 May 2005 in *Ocalan v. Turkey*, Application No. 46221/99.

⁵² Judgement of 2 March 2010 in *Al-Saadoon and Mufdhi v. United Kingdom*, Application No. 61498/08, para. 115.

III. Death penalty and the prohibition of torture and cruel, inhuman and degrading treatment or punishment

A. Overview

25. The Special Rapporteur investigated the relationship between the death penalty and the prohibition of torture and cruel, inhuman and degrading treatment, taking into account the international community's dialogue on the abolition of the death penalty, including the calls by the General Assembly for a moratorium on executions and previous work on the subject (e.g., A/HRC/10/44 and A/HRC/19/61/Add.4).

B. Legal framework

26. Capital punishment is the ultimate exception to the inherent right to life. Article 6 of the International Covenant on Civil and Political Rights and respective regional provisions allow use of the death penalty as the ultimate form of punishment under specific conditions. Accordingly, and despite the global trend towards the abolition of capital punishment, the continued use of the death penalty does not constitute a violation per se of the right to life if imposed and executed in accordance with severe restrictions and safeguards provided by international and domestic law. Simultaneously, international law absolutely prohibits torture and cruel, inhuman or degrading treatment or punishment (art. 7 of the Covenant, and arts. 1 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).²

27. It has long been the view in doctrine and jurisprudence that article 6 of the Covenant (as well as the exclusion of "pain and suffering arising only, inherent in or incidental to lawful sanctions" from the definition of torture in art. 1, para. 1, of the Convention against Torture) means that the death penalty cannot be considered per se a violation of the prohibition of torture and cruel, inhuman or degrading treatment or punishment. However, as noted by the Special Rapporteur's predecessor in his 2009 report on the death penalty (A/HRC/10/44) in reference to judicial bodies, such interpretation may change over time, as was the case with the prohibition of corporal punishment.

28. At first glance, the language in article 1, paragraph 1, of the Convention against Torture appears to carve out an exception under which pain or suffering stemming from lawful sanctions categorically cannot be torture. Yet, this reading of article 1 is belied by extensive treaty body authority findings of a violation of the prohibition in article 1 with regard to various forms of lawful corporal punishment.³ The proper understanding is that the exclusion refers to sanctions that are lawful under both national and international law. Since it is widely accepted that corporal punishment at least amounts to cruel, inhuman or degrading treatment, it does not qualify as a lawful sanction and, accordingly, is not immune from being categorized

² European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2; American Convention on Human Rights, art. 4; and African Charter on Human and Peoples' Rights, art. 4.

³ For example, Judgement of 25 April 1978 in *Tyrer v. the United Kingdom*, Series A, No. 26; and Decision of 11 March 2005 in *Winston Caesar v. Trinidad and Tobago*, Series C, No. 123.

which it confirmed that the death penalty was the ultimate form of cruel, inhuman and degrading punishment.

69. At the national level, a first and prominent attempt to consider the death penalty as cruel, inhuman or degrading treatment was made by United States Supreme Court Justice Brennan in his dissenting opinion to the judgement in *Gregg v. Georgia* (1976).⁵³ He stated that the fatal constitutional infirmity in the punishment of death was that it treated members of the human race as non-humans, as objects to be toyed with and discarded. It was thus inconsistent with the fundamental premise of the clause (on prohibition of cruel and unusual punishment), and that even the vilest criminal remained a human being possessed of common human dignity. He emphasized that foremost among the moral concepts recognized in the cases before the Court and inherent in the clause was the primary moral principle that the State, even as it punished, must treat its citizens in a manner consistent with their intrinsic worth as human beings, and that a punishment must not be so severe as to be degrading to human dignity.

70. A significant number of courts of last instance and constitutional courts have found that the death penalty per se violates the prohibition of cruel, inhuman or degrading punishment. The South African Constitutional Court in the landmark judgement in *State v. Makwanyane and Mchunu* (1995) held that the death penalty was contrary to the prohibition by the South African Constitution of cruel, inhuman or degrading treatment.⁵⁴ In 2001, the Canadian Supreme Court in *United States v. Burns*⁵⁵ considered capital punishment to amount to cruel and unusual punishment. The Court stated that in Canada, the death penalty had been rejected as an acceptable element of criminal justice, and that capital punishment engaged the underlying values of the prohibition against cruel and unusual punishment. Furthermore, the Constitutional Courts of Albania, Hungary, Lithuania and Ukraine have found that the death penalty per se violates the prohibition of cruel, inhuman and degrading treatment.⁵⁶

71. The President of Mongolia justified the abolition of capital punishment by referring to the degrading character of the death penalty.⁵⁷ In addition, while reporting back to the Secretary-General concerning moratoriums on the use of the death penalty (A/65/280 and Corr.1), Bulgaria stated that it considered the death penalty to be an extreme form of physical and psychological violence upon human beings and as such it constituted, in the utmost degree, a cruel, inhumane and degrading treatment or punishment. Denmark was also firmly convinced that the death penalty was brutal, inhumane and an affront to human integrity and human dignity, no matter how cruel the offence. Similarly, Slovenia considers that the death penalty constitutes cruel, inhuman and degrading treatment and a violation of international law. This is a result of the execution itself, as well as the cruelty in forcing the convicted person to wait on death row, often for many years, contemplating execution. Spain considers the death penalty as cruel and inhumane treatment and as an unacceptable violation of human dignity and integrity. Italy in

⁵³ Dissenting opinion to judgement in *Gregg v. Georgia*, United States Supreme Court, 428 U.S. 53 (1976), p. 229.

⁵⁴ Constitutional Court of South Africa, Judgement of 6 June 1995, *State v. Makwanyane and Mchunu*, Case No. CCT/3/94.

⁵⁵ Supreme Court of Canada, *United States v. Burns*, 2001, S.C.R. 283, p. 289.

⁵⁶ Judgement of 12 May 2005 in *Ocalan v. Turkey*, Application No. 46221/99, para. 177.

⁵⁷ Speech delivered on 14 January 2010. Available from www.president.mn/eng/newsCenter.

as torture.⁴ As far back as 1988, the Special Rapporteur appointed to examine questions relevant to torture stated that it was international law, not domestic law, which ultimately determined whether a certain practice might be regarded as lawful, and that practices which might initially be considered lawful might become outlawed and viewed as the most serious violations of human rights (E/CN.4/1988/17, paras. 42 and 44).

IV. Actual practices of capital punishment that violate the prohibition of torture and cruel, inhuman or degrading treatment or punishment

29. Even if considered legal under international law, the actual practice of the death penalty is not left to the unfettered discretion of the State but must itself comply with the other requirements of the Covenant, notably the prohibition of cruel, inhuman or degrading treatment, set out in article 7.⁵ In practice, executions today often violate the absolute prohibition, either because of the death row phenomenon or because the method applied involves unnecessary suffering and indignity.

30. In paragraph 7 of its resolution 1996/15, the Economic and Social Council urged Member States in which the death penalty might be carried out to effectively apply the Standard Minimum Rules for the Treatment of Prisoners in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering. Taking into account new forensic evidence and discussions concerning the various forms of executions and the situation of persons sentenced to death awaiting execution on death row, the Special Rapporteur urges serious reconsideration of whether the actual practice of the death penalty amounts to cruel, inhuman and degrading treatment, or even torture.

A. Methods of execution

Methods of execution that per se violate the prohibition of torture and cruel, inhuman and degrading treatment or punishment

31. The jurisprudence of regional human rights bodies and national judiciaries leaves no doubt that death by stoning constitutes torture and is, beyond dispute, a violation of the prohibition of cruel, inhuman and degrading treatment. In *Jabari v. Turkey* (2000),⁶ the European Court of Human Rights held that death by stoning was a violation of the prohibition on torture and that the possibility of being stoned to death would make deportation of the complainant to the Islamic Republic of Iran contrary to article 3 of the European Convention. At the United Nations, the Commission on Human Rights described execution by stoning as a particularly cruel or inhuman means of execution.⁷ During the period from July 2011 until June 2012,

⁴ Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, eds., *International Human Rights Law* (Oxford University Press, 2010), para. 2.3.2.

⁵ Human Rights Committee, general comment No. 20 (A/47/40, chap. VI.A), para. 6; and *In the Matter of Sentencing of Taha Yassin Ramadan*, Application for Leave to Intervene as Amicus Curiae of United Nations High Commissioner for Human Rights (Iraqi Supreme Criminal Tribunal, 8 February 2007).

⁶ Judgement of 11 July 2000 in *Jabari v. Turkey*, Application No. 40035/98.

⁷ Commission on Human Rights resolutions 2003/67, para. 4 (i); 2004/67, para. 4 (i); and 2005/59, para. 7 (i).

no execution by stoning was recorded and in the Islamic Republic of Iran, the new Islamic Penal Code of January 2012 no longer provides for such punishment (A/HRC/21/29 and Corr.1, para. 46).

32. The same can be concluded with regard to execution by gas asphyxiation. In the case *Ng v. Canada* (1993), the Human Rights Committee concluded that this method of execution results in death in more than 10 minutes and constituted cruel and inhuman treatment in violation of article 7 of the Covenant, and would not meet the test of least possible physical and mental suffering, as required under the Covenant.⁸ However, the Committee did not discuss whether other methods of execution would be considered violations of article 7. In any event, the criteria to determine the threshold of pain and suffering beyond which an execution violates international law prohibitions is not limited to the time that it takes for a person to die.

Methods of execution that arguably violate the prohibition of torture and cruel, inhuman and degrading treatment

33. The United Nations High Commissioner for Human Rights has suggested that hanging, as a matter of law, is contrary to article 7 of the Covenant. In 2007, the High Commissioner submitted an amicus curiae application to the Iraqi Supreme Criminal Tribunal because of the real risk that the method of execution would itself amount to inhuman or degrading treatment or punishment.⁹ Acknowledging that the prohibition of cruel, inhuman and degrading treatment was a core provision of international human rights law, the High Commissioner found that the executions (by hanging), were so flawed as to amount, in their implementation, to cruel, inhuman and degrading punishment.

34. In *Mwamba v. Zambia* (2010), the petitioner argued before the Human Rights Committee that hanging constituted cruel, inhuman and degrading treatment in violation of article 7 of the Covenant.¹⁰ The Committee did not address the issue, choosing instead to locate a violation of the petitioner's rights in article 10, concerning human dignity. Similarly, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have left open the question as to whether hanging constitutes cruel, inhuman or degrading treatment.¹¹

35. In *Al-Saadoon & Mufdhi v. United Kingdom*, the petitioners presented evidence that hanging was an ineffectual and extremely painful method of killing such as to amount to inhuman and degrading treatment in breach of article 3 of the European Convention.¹² The petitioners submitted three expert reports showing that there was an impermissibly high risk that the victim would suffer an unnecessarily painful and tortuous death by strangulation. They argued that the manner in which hangings were carried out in Iraq was seriously and fundamentally flawed. While the Court of

⁸ Decision of 5 November 1993 in *Charles Chitat Ng v. Canada*, communication No. 469/1991.

⁹ *In the Matter of Sentencing of Taha Yassin Ramadan*, Application for Leave to Intervene as Amicus Curiae of United Nations High Commissioner for Human Rights (Iraqi Supreme Criminal Tribunal, 8 February 2007).

¹⁰ Human Rights Committee, 30 April 2010, *Mwamba v. Zambia*, communication No. 1520/2006.

¹¹ For example, Inter-American Commission on Human Rights, Report No. 58/02, Merits Case 12.275, *Denton Aitken v. Jamaica*, 21 October 2002, para. 138.

¹² Judgement 2 March 2010 in *Al-Saadoon & Mufdhi v. United Kingdom*, application No. 61498/08, para. 99.

Appeal in the United Kingdom rejected the petitioners' arguments,¹³ the European Court found a violation of the prohibition of torture and cruel, inhuman or degrading treatment because whatever the method of execution, the extinction of life involved some physical pain. In addition, the Court held that foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering.

36. In 1994, the High Court of the United Republic of Tanzania found, in the *Mbushuu* case¹⁴ that the death penalty was unconstitutional on the grounds that execution by hanging violated the right to dignity of a person and constituted inherently cruel, inhuman and degrading treatment. In the *Kigula* case (2009)¹⁵ before the Supreme Court of Uganda, Justice Egonda Ntende, in dissent, cited powerful evidence of the cruel, inhuman and degrading nature of hanging. Finding the expert evidence concerning hangings to be chilling, Justice Ntende concluded that various practices associated with hanging in Uganda, including subjecting those who do not die instantly to bludgeoning or the plucking off of heads, constituted, without a doubt, cruel, inhuman and degrading treatment.

37. In 1994, the Human Rights Committee rejected an argument that lethal injection constituted cruel, inhuman or degrading treatment or punishment¹⁶ but has not revisited the issue since new evidence has emerged indicating that the combination of drugs used in lethal injection can cause excruciating pain.¹⁷ However, in concluding observations, both the Human Rights Committee (A/50/40, para. 296) and the Committee against Torture (CAT/C/USA/CO/2, para. 31) called on the United States of America, as one of the countries in which lethal injection is used, to review its execution methods in order to prevent severe pain and suffering.

38. Following a number of executions in the United States, it has recently become apparent that the regimen, as currently administered, does not work as efficiently as intended. Some prisoners take many minutes to die and others become very distressed. New studies conclude that even if lethal injection is administered without technical error, those executed may experience suffocation, and therefore the conventional view of lethal injection as a peaceful and painless death is questionable.¹⁸ Experts suggest that current protocols used for lethal injection in the United States probably violate the prohibition of cruel and unusual punishment.

39. This new evidence, however, was rejected by the Supreme Court of the United States of America in *Baze et al. v. Rees* (2008).¹⁹ The Court agreed to hear a challenge to the use of lethal injection as a method of execution following a case in

¹³ Case No. C4/2008/3083 (citation No. 2009 EWCA Civ 7).

¹⁴ *Republic v. Mbushuu alias Dominic Mnyaroje and Kalai Sangula*, High Court of the United Republic of Tanzania, 22 June 1994.

¹⁵ Supreme Court of Uganda in *Attorney General v. Susan Kigula and 417 others* (Constitutional Appeal No. 3 of 2006), 2009.

¹⁶ For example, *Cox v. Canada*, communication No. 539/1993.

¹⁷ Most states in the United States of America continue to execute prisoners by injecting them with a combination of three chemical substances: a barbiturate to anaesthetize; pancuronium bromide or pavulon (a paralytic agent); and potassium chloride (the toxic agent which induces cardiac arrest). It is suggested that the paralytic agent may well disguise the suffering actually experienced by the person executed.

¹⁸ For example, Teresa A. Zimmers and others, "Lethal injection for execution: chemical asphyxiation?", *PLoS Medicine*, vol. 4, No. 4 (24 April 2007). Available from www.plosmedicine.org.

¹⁹ *Baze et al. v. Rees, Commissioner, Kentucky Department of Corrections et al.* of 16 April 2008, case No. 07-5439.

which the administration of a second dose of poison was required and where the convicted man took 34 minutes to die. However, the Court rejected the arguments that the lethal injection process created an unacceptable risk of suffering due to a drug combination that masked pain; that the use of potassium chloride could cause an incredibly painful death if the prisoner were not properly anaesthetized; and that other drugs were available that would cause a painless death. The Court also rejected the argument that the lethal injection process was flawed because of deficiencies in the way in which the drugs were administered, lack of the training required for those responsible for administering the drugs, and lack of clinical evidence showing the safety and effectiveness of certain drugs used in executions. Finally, the Court rejected the argument that these defects, in combination with a lack of regulatory oversight by the United States administration and an absence of meaningful State oversight, established that lethal injection constituted cruel and unusual punishment. Remarkably, the Court also stated that a stay of execution might not be granted unless the condemned prisoner established that the State's lethal injection protocol created a demonstrated risk of severe pain.

40. The method of firing squad has so far been considered as the fastest way of execution and as not causing severe pain and suffering.²⁰ However, executions conducted in public often expose convicts to undignified and shameful displays of contempt and hatred. Conversely, secret executions violate the rights of the convict and family members to prepare for death.

41. In conclusion, it can be stated that even retentionist States agree that some methods of execution constitute cruel, inhuman and degrading treatment and are therefore prohibited under international law (e.g., see A/63/293 and Corr.1, para. 67). In addition, there is a growing trend to scrutinize all other methods of execution so far considered as not causing severe pain and suffering. In this respect, there is no categorical evidence that any method of execution in use today complies with the prohibition of torture and cruel, inhuman or degrading treatment in every case. Even if the required safeguards (Economic and Social Council resolution 1984/50, annex) are in place, all methods of execution currently used can inflict inordinate pain and suffering. States cannot guarantee that there is a pain-free method of execution.

B. Death row phenomenon

42. The death row phenomenon is a relatively new concept, albeit one that has become firmly established in international jurisprudence. It consists of a combination of circumstances that produce severe mental trauma and physical deterioration in prisoners under sentence of death.²¹ Those circumstances include the lengthy and anxiety-ridden wait for uncertain outcomes, isolation, drastically reduced human contact and even the physical conditions in which some inmates are held. Death row conditions are often worse than those for the rest of the prison population, and prisoners on death row are denied many basic human necessities. Examples of current death row conditions around the world include solitary confinement for up to 23 hours a day in small, cramped, airless cells, often under

²⁰ Human Rights Committee, decision of 3 April 2003 in *Mariya Staslovich (and Igor Lyashkevich) v. Belarus*, communication No. 887/1999, para. 9.2.

²¹ For example, Patrick Hudson, "Does the death row phenomenon violate a prisoner's rights under international law?", *European Journal of International Law*, vol. 11, No. 4 (2000), pp. 834-837.

extreme temperatures; inadequate nutrition and sanitation arrangements; limited or non-existent contact with family members and/or lawyers; excessive use of handcuffs or other types of shackles or restraints; physical or verbal abuse; lack of appropriate health care (physical and mental); and denial of access to books, newspapers, exercise, education, employment, or other types of prison activity.

43. Regional courts have confirmed the existence and destructive nature of the death row phenomenon. In the landmark decision *Soering v. United Kingdom* (1989), the European Court of Human Rights held that the death row phenomenon as practised in the State of Virginia in the United States of America violated the prohibition of cruel, inhuman and degrading treatment.²² The Court was presented with facts detailing the extensive period of time people spend on death row in extreme conditions and the ever-mounting anguish of awaiting execution. The European Court in subsequent decisions reaffirmed this view.

44. In the inter-American system, there have been significant findings of mistreatment of those on death row. With regard to detention conditions, the Inter-American Commission on Human Rights held, in *Lallion v. Grenada* (2002),²³ that the conditions on death row in Grenada failed to respect the physical, mental and moral integrity required under article 5, paragraph 1, of the American Convention on Human Rights. In *Aitken v. Jamaica* (2002)²⁴ the Commission held that the detention conditions, when considered in the light of the lengthy period of nearly four years for which the petitioner had been detained on death row, had failed to satisfy the standards of humane treatment under article 5, paragraphs 1 and 2, of the aforementioned Convention. The Inter-American Court of Human Rights stated, in *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (2002)²⁵ that the death row phenomenon was a cruel, inhuman and degrading treatment, and was characterized by a prolonged period of detention while awaiting execution, during which prisoners sentenced to death suffered severe mental anxiety in addition to other circumstances, including, among others: the way in which the sentence was imposed; lack of consideration of the personal characteristics of the accused; the disproportionality between the punishment and the crime committed; the detention conditions while awaiting execution; delays in the appeal process or in reviewing the death sentence during which time the individual experienced extreme psychological tension and trauma; the fact that the judge did not take into consideration the age or mental state of the condemned person; and continuous anticipation by the prisoners about what practices their execution may entail. The Inter-American Commission has consistently concluded, across different working mechanisms and in countries throughout the region, that the conditions afforded to prisoners on death row are most often inhumane and that a prolonged stay on death row and the anxiety created by the threat of death, as well as other conditions,

²² Judgement of 7 July 1989 in *Soering v. United Kingdom*, Application No. 14038/88, Series A, No. 161, para. 111.

²³ Inter-American Commission on Human Rights, Report No. 55/02, Merits Case 11.765, Paul Lallion (Grenada, 21 October 2002), paras. 86-90.

²⁴ Inter-American Commission on Human Rights, Report No. 58/02, Merits Case 12.275, *Denton Aitken v. Jamaica*, 21 October 2002, paras. 133 and 134.

²⁵ Judgement of 21 June 2002 in *Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago*, Series C, No. 94, paras. 167 and 168.

constitute a violation of the prohibition of torture and cruel, inhuman or degrading treatment.²⁶

45. The Human Rights Committee and national courts have recognized the existence of the death row phenomenon as a possible breach of article 7 of the Covenant.²⁷ The African system provides substantial evidence for this claim. In *Catholic Commissioner for Justice and Peace in Zimbabwe v. Attorney General and Others* (1993)²⁸ the Supreme Court recognized judicial and academic acceptance of the existence of the death row phenomenon. The Court held that, having regard to judicial and academic consensus concerning the death row phenomenon, the prolonged delays and the harsh conditions of incarceration, a sufficient degree of seriousness had been attained to entitle the applicant to invoke the protection afforded by the Constitution under section 15, paragraph 1 (concerning the prohibition of torture and inhuman or degrading punishment). The Court held that 52 and 72 months, respectively, on death row constituted a violation of the prohibition of torture and would render an actual execution unconstitutional. In *Attorney General v. Susan Kigula* (2009), the Supreme Court of Uganda acknowledged that a prolonged stay on death row constituted cruel and inhuman treatment.²⁹ The Court found that execution after an inordinate delay would be inconsistent with the Ugandan Constitution which ensures freedom from torture and cruel, inhuman or degrading treatment or punishment.

46. In 1993, the Judicial Committee of the Privy Council of the British House of Lords took the approach that length of time is the sole factor in constituting cruel or inhuman punishment. The case of *Pratt and Morgan v. Jamaica*³⁰ created a presumption that spending more than five years on death row met the criteria necessary for a finding of death row phenomenon. The Privy Council's reasoning was that the domestic appeals process should take approximately two years and an appeal to an international body should take approximately 18 months. By combining the two, and adding an appropriate amount of time for reasonable delay, the Court was able to come up with a timetable of five years. In a number of cases, the Privy Council relied on the five-year principle as a guide. In *Guerra v. Baptiste* (1996),³¹ it found that four years and ten months under sentence of death, as a result of factors beyond the prisoner's control, constituted the death row phenomenon and therefore a violation. In *Henfield v. Bahamas* (1997),³² three and a half years was deemed an appropriate time limit. Similarly, in the landmark ruling of the Supreme Court of Uganda in January 2009,³³ the Court held that to execute a person after a delay of

²⁶ Inter-American Commission on Human Rights, *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, OEA/Ser.L/V/II, Doc. 68 (31 December 2011).

²⁷ For example, Human Rights Committee, decision of 30 July 1993 in *Kindler v. Canada*, communication No. 470/1991; Privy Council in *Pratt v. Attorney General for Jamaica*, Appeal No. 10.22 (1993); Supreme Court of Canada in *Kindler v. Canada (Minister of Justice)*, 2 S.C.R. 779 (1991).

²⁸ Judgement of the Supreme Court of Zimbabwe of 24 June 1993 in *Catholic Commissioner for Justice and Peace in Zimbabwe v. Attorney General* (4) SA 239 (ZS).

²⁹ Supreme Court of Uganda in *Attorney General v. Susan Kigula and 417 others* (Constitutional Appeal No. 3 of 2006), 2009. See also Court of Appeal of Kenya, Judgement of 30 July 2010 in *Godfrey Ngunjiri Mutiso v. Republic*, H.C.CR.C.NO.55.

³⁰ Privy Council in *Pratt and Morgan v. Attorney General of Jamaica*.

³¹ Privy Council in *Guerra v. Baptiste* (1996), AC 397, PC.

³² Privy Council in *Henfield v. Attorney General of the Bahamas* (1997), AC 413, PC.

³³ Supreme Court of Uganda in *Attorney General v. Susan Kigula*.

three years in conditions that were not acceptable by Ugandan standards would amount to cruel, inhuman punishment. With regard to the reasons for the delay, the Privy Council found that delay inappropriately caused by the prisoner could not be used to the advantage of the inmate but where a State caused the delay, it was logical to hold the State responsible for violating the prisoner's rights. However, where delay was caused by a prisoner exercising his legitimate right to appeal, the fault was to be attributed to the appellate system that permitted such delay and not to the prisoner who took advantage of it. The Privy Council recognized that a prisoner would cling to any hope in order to protect his or her life, and that such human instinct could not be treated as a prisoner's fault. The European Court went even further and took the position that even if the delay was the result of the inmate's actions, he or she was not to be blamed for pursuing life as the fact remained that individuals were pursuing life under death row conditions with mounting tension over their own death.

47. Prolonged delay is, however, only one cause of the death row phenomenon and, considered alone, may be harmful to a prisoner's rights. This approach risks conveying a message to States parties to carry out a capital sentence as expeditiously as possible after it is imposed. The Human Rights Committee declined to find that delay alone is enough to warrant a finding of death row phenomenon and a violation based on torture or cruel, inhuman or degrading punishment. Consequently, even in cases of detention on death row for more than 10 years, the Committee maintained its previous practice of not finding a violation of article 7 of the Covenant unless such detention was aggravated by particularly harsh prison conditions. However, prolonged detention, as with any other delay in the process, must be subject to judicial review and the highest standards of regular review must be applied. Medical assistance and psychological follow-up should also be considered. It is the combined deprivation of basic human rights on death row which amounts to inhuman and degrading treatment or even torture.

48. Solitary confinement is one of the most common practices used on death row. As outlined in the previous report of the Special Rapporteur to the General Assembly (A/66/268), given its severely adverse effects on health, solitary confinement itself can amount to torture or cruel, inhuman or degrading treatment. Individuals held in solitary confinement suffer extreme forms of sensory deprivation, anxiety and exclusion, clearly surpassing lawful conditions of deprivation of liberty. Solitary confinement, in combination with the foreknowledge of death and the uncertainty of whether or when an execution is to take place, contributes to the risk of serious and irreparable mental and physical harm and suffering to the inmate. Solitary confinement used on death row is by definition prolonged and indefinite and thus constitutes cruel, inhuman or degrading treatment or punishment or even torture.

49. Other harsh conditions currently employed on death rows throughout the world may themselves constitute violations of the prohibition of torture or cruel, inhuman or degrading treatment. The Human Rights Committee has expressed concern over the living condition of inmates on death row in terms of visits and correspondence, cell size, food, exercise, extreme temperatures, lack of ventilation, and lack of time outside of cells as constituting violations of articles 7 and 10 of the Covenant. The Special Rapporteur's predecessor, in the report on his visit to Mongolia, declared that physical conditions on Mongolia's death row alone might be so poor as to amount to cruel treatment (see E/CN.4/2006/6/Add.4).

50. In addition, death row prisoners constantly face unimaginable anxiety over their own imminent death. Additional circumstances, including lack of notice as to the date of the execution, public executions and mistakes in administering the execution increase the mental trauma of persons sentenced to death. Numerous scholars have documented the severe mental trauma associated with death sentences.³⁴ The anxiety and foreknowledge of death affect the mental integrity of a person sentenced to death and can amount to torture or cruel, inhuman or degrading treatment.

51. The mandate of the Special Rapporteur on torture has previously given rise to the question of whether the psychological effect of uncertainty may be equated with severe mental suffering, and whether this situation is reconcilable with the required respect for human dignity and physical and mental integrity (E/CN.4/1988/17, para. 47). The Committee against Torture has addressed the conditions of detention for those on death row, which may involve cruel, inhuman or degrading treatment not only as a result of physical circumstances but as a consequence of the mental anguish caused by spending an excessive length of time there (CAT/C/ZMB/CO/2, para. 19). The Special Rapporteur on extrajudicial, summary or arbitrary executions has acknowledged the mere possibility that the death penalty can be applied during de facto abolition threatens the accused for years, and is a form of cruel, inhuman or degrading treatment or punishment (E/CN.4/2006/53/Add.4, para. 35; also (A/HRC/8/3/Add.3, para. 76). The Inter-American Court in the *Hilaire* case³⁵ concluded that the victims lived under constant threat that they may be taken to be hanged at any moment and that the procedures leading up to death by hanging terrorized and depressed the prisoners. The Court found that the prospect of the prisoners being taken from their cells and hanged at any moment or compelled to live under circumstances that impinged on the physical and psychological integrity constituted cruel, inhuman and degrading treatment. In the United States of America, the Supreme Court of California found that the process of carrying out a verdict of death is so degrading to the human spirit as to constitute psychological torture.³⁶ The Supreme Court of Zimbabwe has recognized in particular the impact on mental integrity that a death sentence may have.³⁷ Finally, one of the reasons United States Supreme Court Justice William J. Brennan gave for his conclusion that capital punishment was per se unconstitutional was that mental pain was an inseparable part of the practice of punishing criminals by death, for the prospect of pending executions exacted a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.³⁸

Rights of families of persons sentenced to death

52. In relation to the enforcement of the death penalty, the Human Rights Committee has recommended that families of death row inmates be given

³⁴ For example, William Schabas, "Developments in Criminal Law and Justice: Execution delayed, execution denied", *Criminal Law Forum*, vol. 5, No. 1 (1994). Also see "Mental suffering under sentence of death: a cruel and unusual punishment", *Iowa Law Review*, No. 57 (1972).

³⁵ Judgement of 21 June 2002 in *Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago*, Series C, No. 94, paras. 168 and 169.

³⁶ Supreme Court of California in *People v. Anderson*, 6 Cal.3d 628, 649 (1972).

³⁷ *Catholic Commissioner for Justice and Peace v. Attorney General* (see note 28).

³⁸ United States Supreme Court, Judgement of 29 June 1972 in *Furman v. Georgia*, 408 U.S. 238 at 288 (Brennan dissent).

reasonable advanced notice of the scheduled date and time of execution, with a view to reducing the psychological suffering caused by the lack of opportunity to prepare themselves for that event (CCPR/C/JPN/CO/5, para. 16). Similarly, in *Staselovich v. Belarus*,³⁹ the Committee found that the failure of the authorities to notify the mother of the scheduled date for the execution of her son and their subsequent persistent failure to notify her of the location of her son's grave amounted to inhuman treatment of the mother. Secrecy and the refusal to hand over remains to families are especially cruel features of capital punishment, highlighting the need for total transparency and avoidance of harm to innocents in the whole process.

V. Death penalty as a violation of the prohibition of torture and cruel, inhuman or degrading treatment or punishment

A. Evolving standard

53. Developments with regard to methods of execution and the death row phenomenon show the dilemma of international jurisprudence and national courts in regard to the actual application of the death penalty and the contradiction with the prohibition of torture and cruel, inhuman or degrading treatment. While international human rights bodies have yet to take the step of holding the death penalty to per se run afoul of the prohibition of torture and cruel, inhuman or degrading treatment, there is clearly a trend in this direction at the regional and national levels.

54. The Special Rapporteur's predecessor demonstrated the evolving standard regarding the prohibition of corporal punishment, asking whether, if even comparatively lenient forms of corporal punishment, such as 10 strokes on the buttocks, were absolutely prohibited under international human rights law, methods such as hanging, the electric chair, execution by firing squad and other forms of capital punishment could ever be justified under the very same provisions (A/HRC/10/44 and Corr.1, para. 38).

55. In the 1978 case of *Tyrer v. United Kingdom*, the European Court of Human Rights referred to the European Convention as a living instrument that needed to be interpreted in the light of present-day conditions.⁴⁰ In the *Selmouni* case (1999), the Court invoked this reasoning and argued that the definition of torture had to evolve with a democratic society's understanding of the term.⁴¹ Similar shifts in international law and, in particular, evolution of the understanding of prohibition of torture as encompassing prohibition of slavery and domestic violence or, more recently, the qualification of rape as falling within the scope of the prohibition of torture and cruel, inhuman or degrading treatment, show that the notion of torture has developed over time, and acts originally considered as lawful become unlawful and prohibited under the right to be free from torture (e.g., see A/HRC/13/39, para. 60).

³⁹ Decision of 3 April 2003 in *Mariya Staselovich (and Igor Lyashkevich) v. Belarus*, communication No. 887/1999, para. 9.2.

⁴⁰ Judgement of 25 April 1978 in *Tyrer v. the United Kingdom*, Series A, No. 26, para. 31.

⁴¹ Judgement of 28 July 1999 in *Selmouni v. France*, Application No. 25803/94, para. 101.

56. The question therefore arises of whether or not there is an evolving standard regarding the death penalty comparable to that regarding the prohibition of slavery and corporal punishment. In order to answer that question, the present report examines recognized standards on the enforcement of the death penalty and normative developments at the international and regional levels.

57. International law imposes severe restrictions on the death penalty and demands serious safeguards for it to be lawfully applied. It also outlaws it in some specific circumstances or with regard to specific groups of vulnerable persons. As stated by the Special Rapporteur on extrajudicial, summary or arbitrary executions in regard to the death penalty, non-compliance with these standards leads to arbitrary and thus unlawful deprivation of life.

58. In addition, and especially relevant to the emergence of a customary norm to consider the death penalty as running afoul of the prohibition of torture and cruel, inhuman and degrading treatment, is evidence of a consistent global practice by States that reflects the view that the imposition and enforcement of the death penalty in breach of those standards is a violation per se of the prohibition of torture or cruel, inhuman or degrading treatment. This conclusion originates from the fact that international law does not attribute a different value to the right to life of different groups of human beings, such as juveniles, persons with mental disabilities, pregnant women or persons sentenced after an unfair trial, but considers the imposition and enforcement of the death penalty in such cases as particularly cruel, inhuman and degrading and in violation of article 7 of the Covenant and articles 1 and 16 of the Convention against Torture.

59. Accordingly, the mandatory death penalty, a legal regime under which judges have no discretion to consider aggravating or mitigating circumstances with respect to the crime or the offender, violates due process and constitutes inhumane treatment. Starting with the case of *Hilaire v. Trinidad and Tobago* (2002), there have been remarkable developments within the Inter-American Commission and Inter-American Court, leading to the conclusion that the automatic imposition of the death penalty without consideration of the individual's circumstances is incompatible with the rights to life, humane treatment and due process. National courts have re-examined the constitutionality of the mandatory death penalty and, with the exception of Trinidad and Tobago and Barbados, considered it as a violation of the prohibition of inhumane treatment. In *Woodson v. North Carolina*, the United States Supreme Court held the mandatory death penalty unconstitutional and in violation of the fundamental respect for humanity.⁴² In Africa, the Supreme Courts of Malawi and of Uganda and, more recently in July 2010, the Court of Appeal of Kenya, rendered the mandatory death penalty unconstitutional.⁴³ In all of those cases, the courts held that it violated protection against subjection to inhuman or degrading punishment or treatment.

60. Under international law, the death penalty can only be carried out pursuant to a final judgement of a competent court and only applied to the most serious crimes. The possible safeguards given during legal process to ensure a fair trial in cases in which the death penalty might be imposed should be at least equal to those

⁴² United States Supreme Court, Judgement of 2 July 1976 in *Woodson v. North Carolina*, 428 U.S. 280 (1976).

⁴³ Court of Appeal of Kenya, *Godfrey Ngotho Mutiso v. Republic*, H.C.CR.C.NO.55 of 2004, Judgement, 30 July 2010.

contained in article 14 of the Covenant. The Inter-American Commission has reaffirmed in its report No. 90 (2009) and in constant jurisprudence that a heightened level of scrutiny has to be applied. This is in line with the jurisprudence of the Human Rights Committee which maintains that legal assistance should be available and that States have an imperative duty to observe rigorously all of the guarantees required for a fair trial.⁴⁴

61. Accordingly, in *Bader and Kanbor v. Sweden* (2005), the European Court of Human Rights held that the applicant had a justified and well-founded fear that the death sentence imposed on him after an unfair trial would be enforced if he were compelled to return to his home country,⁴⁵ and that since executions were carried out without any public scrutiny or accountability, the surrounding circumstances would inevitably cause him considerable fear and anguish. The Court concluded that the death sentence imposed following an unfair trial would cause the applicant and his family additional fear and anguish as to their future if they were forced to return to the Syrian Arab Republic and, accordingly, would give rise to a violation of articles 2 and 3 (referring to the prohibition of torture and cruel, inhuman or degrading treatment) of the European Convention. In *Ocalan v. Turkey* (2005), the European Court held that the fear and uncertainty about the future generated by a death sentence, when a real possibility existed that the sentence would be enforced, inevitably caused strong human anguish.⁴⁶ Such anguish could not be disassociated from the unfairness of the proceedings underlying the sentence, which, given that human life was at stake, became unlawful under the Convention. Consequently, the imposition of the death sentence following an unfair trial by a court whose independence and impartiality were open to doubt was held to amount to inhuman treatment, in violation of article 3 of the European Convention.

62. The death penalty cannot be applied for crimes committed by persons under 18 years of age. In *Michael Domingues v. United States* (2002), the Inter-American Commission canvassed international legal and political developments and State practice concerning the execution of juveniles and reached the conclusion that the state of international law had evolved so as to prohibit, as a *jus cogens* norm, the execution of persons who were under 18 years of age at the time of committal of their crimes.⁴⁷ This is in line with the jurisprudence of the Human Rights Committee. In *Roper v. Simmons* (2005), the United States Supreme Court held that under the evolving standards of decency test, it was cruel and unusual punishment to execute a person who was under the age of 18 years at the time of the murder.⁴⁸ Remarkably, in January 2012, the Government of the Islamic Republic of Iran, one of the most persistent retentionist countries, adopted the Islamic Penal Code which established new measures to limit the sentencing to death of juveniles (A/HRC/21/29 and Corr.1, para. 8). The abolition of the death penalty for juveniles is based on the fact that their limited capacity has a direct impact on their effectively benefiting from the right to a fair trial and that it is inherently cruel to execute

⁴⁴ For example, *Baboheram-Adhin et al. v. Suriname*, communication Nos. 148-154/1983, 4 April 1985; *Pratt and Morgan v. Jamaica*, communication Nos. 210/1986 and 225/1987.

⁴⁵ Judgement of 8 November 2005 in *Bader and Kanbor v. Sweden*, Application No. 13284/04.

⁴⁶ Judgement of 12 May 2005 in *Ocalan v. Turkey*, Application No. 46221/99.

⁴⁷ Inter-American Commission on Human Rights, Report No. 62/02, *Michael Domingues v. United States* (2002), paras. 84-87.

⁴⁸ United States Supreme Court, *Donald P. Roper v. Christopher Simmons*, 543 U.S. (2005).

children and would therefore amount to a violation of the prohibition of torture and cruel, inhuman and degrading treatment.

63. The death penalty may also not be carried out on pregnant women and, according to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the safeguards approved by the Economic and Social Council in its resolution 1984/50, recent mothers. Article 4, paragraph 5, of the American Convention on Human Rights prohibits the imposition of capital punishment on persons who, at the time the crime was committed, were over 70 years of age. In its resolution 1989/64, on the implementation of the aforementioned safeguards, the Economic and Social Council recommended that States strengthen further the protection of the rights of those facing the death penalty by eliminating it for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution. The Commission on Human Rights also adopted several resolutions urging all States not to impose the death penalty on, or to execute, any person suffering from any form of mental disorder (e.g., Commission resolution 2003/67). The Human Rights Committee has stated that the reading of a death warrant for the execution of a mentally incompetent person is a violation of article 7 of the Covenant. In *Atkins v. Virginia* (2002), the United States Supreme Court ruled that executing mentally disabled individuals violated the ban on cruel and unusual punishment and that the prohibition of such punishment should be interpreted in the light of the evolving standard of decency that marked the progress of a maturing society.⁴⁹ The reasoning for the prohibition of the death penalty in these cases is the same as that for juveniles and children. It is inherently cruel to execute pregnant women, nursing mothers, elderly persons and persons with mental disabilities and it leads to a violation of the prohibition of torture and cruel, inhuman and degrading treatment.

64. Not only is the enforcement of the death penalty in these cases considered a violation per se of the prohibition of torture and cruel, inhuman and degrading treatment and punishment but the related State practice has led to the emergence of a *jus cogens* provision regarding the execution of juveniles.

B. Possible emergence of a customary norm

65. Some fundamental human rights standards, such as the prohibition of torture, are a norm of customary international law. The prohibition is non-derogable even in times of emergency and, in addition, is an imperative norm in international law that no State is allowed to ignore (*jus cogens*). The Statute of the International Court of Justice defines international customary law as evidence of a general practice accepted as law (Art. 38, para. 1b). This is generally determined through two factors: the general practice of States and what States have accepted as law (*opinio juris*). States are typically bound by international customary law regardless of whether they have codified such law domestically or through treaties. Evidence for both aspects, State practice and *opinio juris*, is found in the signature and ratification of treaties, in public statement of policy, in votes on resolutions of political organs etc. Discussed below is whether a customary rule against the death penalty is emerging or has emerged.

⁴⁹ United States Supreme Court, *Atkins v. Virginia*, 536 U.S. 304 (2002).

its remarks on the question of the death penalty in April 2012 stated that it considered the death penalty to be inhuman. Finland, in its response to General Assembly resolution 63/168, reported that it considered the death penalty a cruel and inhuman form of punishment. Finally, in a joint contribution to the report of the Secretary-General concerning moratoriums on the use of the death penalty (A/65/280 and Corr.1), the European Union stated that it considered the death penalty to be cruel and inhuman, representing an unacceptable denial of human dignity and integrity.

72. An increasing number of national constitutional courts and political instances have pronounced their conviction that the death penalty is a cruel, inhuman and degrading treatment not reconcilable with the inherent right to physical and mental integrity and human dignity. It can be said, therefore, that there is an evolving standard whereby States and judiciaries consider the death penalty to be a violation per se of the prohibition of torture or cruel, inhuman or degrading treatment. A review of precedents to determine the existence of such a norm as an already established custom is beyond the capacity of the present report. Nevertheless, the Special Rapporteur is convinced that a customary norm prohibiting the death penalty under all circumstances, if it has not already emerged, is at least in the process of formation.

VI. Conclusions and recommendations

73. The evolving practice of States shows a clear trend towards abolition of the death penalty. Even in retentionist countries, practices and opinions have changed. Significantly, the trend to abolish and the trend to restrict are both informed by a stated conviction that capital punishment is cruel, inhumane and degrading, either per se or as applied.

74. To date, the death penalty has been treated under the provisions concerning the right to life, and therein as an exception provided for by international law. A new approach is needed as there is evidence of an evolving standard within international bodies and a robust State practice to frame the debate about the legality of the death penalty within the context of the fundamental concepts of human dignity and the prohibition of torture and cruel, inhuman or degrading treatment or punishment. This evolving standard, along with the resulting illegality of the death penalty under such prohibition, is developing into a norm of customary law, if it has not already done so.

75. The Special Rapporteur finds that even if the emergence of a customary norm that considers the death penalty as per se running afoul of the prohibition of torture and cruel, inhuman or degrading treatment is still under way, most conditions under which capital punishment is actually applied renders the punishment tantamount to torture. Under many other, less severe conditions, it still amounts to cruel, inhuman or degrading treatment.

76. The prohibition of torture and cruel, inhuman or degrading treatment and the strict adherence to safeguards constitute absolute limits on the use and enforcement of the death penalty. It may still be theoretically possible to impose and execute the death penalty without running afoul of the absolute prohibition of torture and cruel, inhuman or degrading treatment, but the rigorous conditions that States must apply for that purpose make the retention of capital

punishment not worth the effort. Even with such conditions, States cannot guarantee that in all cases the prohibition of torture will be scrupulously adhered to.

77. Death by stoning or gas asphyxiation is already clearly prohibited under international law. Furthermore, there is no categorical evidence that any method in use today can be said to comply with the prohibition of torture and cruel, inhuman or degrading treatment.

78. The death row phenomenon is a violation of article 7 of the International Covenant on Civil and Political Rights, and of article 1 or article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, depending on the length of isolation and severity of conditions. The anxiety created by the threat of death and the other circumstances surrounding an execution, inflicts great psychological pressure and trauma on persons sentenced to death. A prolonged stay on death row, along with the accompanying conditions, constitutes a violation of the prohibition of torture itself.

Recommendations

79. The Special Rapporteur calls upon all States to reconsider whether the use of the death penalty per se respects the inherent dignity of the human person, causes severe mental and physical pain or suffering and constitutes a violation of the prohibition of torture or cruel, inhuman or degrading treatment. He recommends a more comprehensive legal study on the emergence of a customary norm prohibiting the use of the death penalty under all circumstances.

80. Whether or not a customary norm prohibiting the death penalty has crystallized, the Special Rapporteur calls upon all retentionist States to observe rigorously the restrictions and conditions imposed by article 7 of the International Covenant on Civil and Political Rights and article 1 or article 16 of the Convention against Torture. The Special Rapporteur calls upon retentionist States:

(a) To abolish the use of the death penalty for juveniles, persons with mental disabilities and pregnant women and give further consideration to abolishing the death penalty for persons over the age of 70 years and for recent mothers;

(b) To ensure that the method of execution employed causes the least possible physical and mental suffering and that it does not violate the prohibition of torture and cruel, inhuman or degrading treatment; establish that there are no more humane alternatives available; and justify the use of a particular method of execution. The Special Rapporteur reiterates that the burden of proof is on the State;

(c) To refrain from carrying out executions in public or in any other degrading manner; end the practice of secret executions; and end the practice of executions with little or no prior warning given to condemned prisoners and their families;

(d) To improve conditions on death row in accordance with international standards, such as the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person, as protected by article 10, paragraph 1, of the International Covenant on Civil and Political Rights;

(e) To use solitary confinement on death row only in accordance with the recommendations made in his previous report to the General Assembly (A/66/268);

(f) To respect the rights of the families and relatives of persons sentenced to death.

81. In accordance with article 3 of the Convention against Torture and further customary law, the Special Rapporteur calls upon all States not to expel, return or extradite a person to another State where there are substantial grounds for believing that there is a danger of the person being sentenced to death and subsequently subjected to detention on death row, severe mental or physical suffering or executed in a manner inconsistent with the prohibition of torture and cruel, inhuman or degrading treatment.